INDEX TO BRIEF

		Page
I	CITATION TO OPINIONS OF LOWER COURTS	2
II	BASIS FOR JURISDICTION	2
III	QUESTION PRESENTED FOR REVIEW	3
IV	CONSTITUTIONAL PROVISION INVOLVED	3
V	STATEMENT OF CASE	4
VI	ARGUMENT AND CONTENTIONS IN SUPPORT FOR ALLOWANCE OF WRIT	6
VII	SUMMARY AND CONCLUSION	16

TABLE OF AUTHORITIES

Cases:

Carroll v. United States,
(1925) 267 U.S. 132, 69 L. Ed. 2d 543,
43 S. Ct. 280 ..... 10, 14

Chambers v. Maroney,
(1970) 399 U.S. 42, 26 L. Ed. 2d 419,
90 S. Ct. 1975 11

Coolidge v. New Hampshire,
(1971) 403 U.S. 443, 29 L. Ed. 2d 564,
91 S. Ct. 2022 ..... 9, 11

Dyke v. Taylor Implement Mfg. Co., Inc.,
(1968) 391 U.S. 216, 20 L. Ed. 2d 538,
88 S. Ct. 1472 11

Katz v. United States,
(1967) 389 U.S. 347 9

Ker v. California,
(1963) 374 U.S. 23 9

Mapp v. Ohio,
(1961) 367 U.S. 643, 6 L. Ed. 2d 1081,
81 S. Ct. 1684 9

McCurdy v. State,
(1965) 42 Ala. App. 646, 176 So. 2d 53..... 11

People v. Cruz,
(1968) 264 Cal. App. 2d 437, 441 12

People v. Erickson,
(1964) 31 Ill. 2d 820, 201 N.E.2d 422 13

People v. Superior Court of Yolo County,
(1970) 3 Cal. 3d 807, 91 Cal. Rptr. 729,
478 P.2d 449 12

Preston v. United States,
(1964) 376 U.S. 364, 11 L. Ed. 2d 777,
84 S. Ct. 881 11

United States v. Garay,
(1973) 477 F.2d 1306 9

Vaughn v. State,
(1971) 477 S.W.2d 260 10

Wong Sun v. United States,
(1963) 371 U.S. 471 14

Constitution:

Fourth Amendment, United States Constitution. 3, 9, 16

Other Authorities:

10 A.L.R.3d, page 314 11
45 A.L.R.3d, page 581 12

INDEX TO APPENDIX

Motion to Suppress Evidence Based on Illegal
Search and Seizure, with Affidavit in
Support Thereof, filed January 2, 1973 .... A. 1

Hearing on Motion to Suppress,
January 2, 1973 ..... A. 4

Order Overruling Motion to Suppress,
filed January 2, 1973..... A. 24

Felony Judgment, filed January 3, 1973 ..... A. 25

Opinion of Court of Criminal Appeals of Tennessee, filed February 25, 1974 ..... A. 26

Judgment entered pursuant to Opinion of Court of Criminal Appeals of Tennessee, filed February 25, 1974 ..... A. 29

Decree of Supreme Court of Tennessee denying Petition for Writ of Certiorari, filed April 1, 1974 ..... A. 31

Order granting stay of execution from Judgment of Court of Criminal Appeals of Tennessee, filed April 2, 1974..... A. 32

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. _____

EARL DEAN EFFLER,

Petitioner,

v.

STATE OF TENNESSEE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

Earl Dean Effler prays for the issuance of a writ of certiorari to review the judgment of the Supreme Court of the State of Tennessee entered on April 1, 1974, wherein it denied a petition for certiorari filed with it on February 26, 1974, in which petitioner requested a review and reversal of the judgment and decision of the Court of Criminal Appeals of Tennessee filed on February 25, 1974, thereby resulting in his conviction becoming final in the State of Tennessee Criminal Appellate System.

I

CITATIONS TO OPINIONS OF LOWER COURTS

The Opinion of the Court of Criminal Appeals of Tennessee consisting of three pages was rendered on February 25, 1974, and apparently has not as yet been reported in the official or unofficial reports, but a copy of said Opinion is appended hereto and set out verbatim in the Appendix (p. A. 26). The Judgment entered pursuant to said Opinion is likewise set out verbatim hereto in the Appendix (p. A. 29), and from said Judgment a Petition for Writ of Certiorari to the Tennessee Supreme Court was filed by petitioner which was denied by the Tennessee Supreme Court on April 1, 1974, said Decree being likewise appended hereto in the Appendix (p. A. 31), which resulted in the Judgment heretofore referred to of the Court of Criminal Appeals of Tennessee becoming final in the State of Tennessee Court system. Thereafter on April 2, 1974, the Honorable W. Wayne Oliver, one of the Judges of the Court of Criminal Appeals of Tennessee, signed an Order granting a stay of execution of the Judgment rendered February 25, 1974, and allowing the petitioner ninety (90) days from April 1, 1974, within which to file a petition for writ of certiorari in the Supreme Court of the United States, a copy of said Order being appended hereto in the Appendix (p. A. 32). The present petition is being filed within that ninety (90) day period.

II

BASIS FOR JURISDICTION

The Judgment sought to be reviewed herein was entered on February 25, 1974. The jurisdiction of the Supreme Court of the United States to review said Judgment is con-

ferred on this Court by Title 28, United States Code Section 1257 (3).

III

QUESTION PRESENTED FOR REVIEW

"WAS THE SEARCH, SEIZURE, AND ADMISSIBILITY INTO EVIDENCE OF THAT PROPERTY UPON WHICH THE PETITIONER'S CONVICTION WAS BASED, REASONABLE UNDER THE SURROUNDING FACTS AND CIRCUMSTANCES SO AS TO BE CONSTITUTIONALLY PERMISSIBLE, AND NOT IN VIOLATION OF THE FOURTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES?

IV

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the Constitution of the United States provides as follows:

> "Amendment 4. Unreasonable searches and seizures.--The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

V

STATEMENT OF CASE

In reviewing the factual matters necessary for a proper determination of the one issue raised herein, it is unnecessary to review the entire record and evidence introduced at the trial, as the material facts are practically undisputed, and it is only the law applicable thereto as expounded and interpreted in the numerous decisions dealing with motor vehicle searches which gives rise to the present controversy.

On Sunday, December 3, 1972, and at around 7:00 p.m. on that date, the petitioner was operating his automobile on a gravel road known as the Marshall Hill Road located in the Wildwood Community in Blount County, Tennessee, which adjoins Sevier County, Tennessee, the latter being the birthplace of the well-known female country and western recording star, Miss Dolly Parton, whose rise to fame and national recognition was hastened by her energetic rendition of a catchy little tune which she wrote and recorded that appropriately describes the thoughts which prompted the actions of the officers who conducted the search of petitioner's vehicle that produced the evidence upon which his conviction was obtained, and his resulting sentence of not more than ten years in the Tennessee State Penitentiary. The title of the tune, "Something Fishy", tells the story of a young wife whose suspicions are aroused by her husband's weak excuses to her for his consistently coming in late at night, and each time in the chorus Miss Parton concludes, "There must be something fishy going on," thereby indicating her tendency to be suspicious of his actions. With that brief introduction, and apologies to Miss Parton, the petitioner will now review the circumstances which led to his arrest, trial, conviction, penitentiary sentence,

appeals through the State of Tennessee court system, and finally to the present petition by which he seeks a review, reversal, and dismissal of said conviction.

The petitioner filed a written Motion to Suppress the evidence with the trial court, and a hearing was held thereon outside the presence of the jury at the beginning of the trial on January 2, 1973, which testimony is set forth in the Appendix hereto (pp. A. 4-A. 23), and which is copied verbatim from Vol. 1 of the Bill of Exceptions at Pages 2-26. Briefly summarized, it is as follows:

On Sunday, the third day of December, 1972, after dark at approximately 7:00 p.m., two deputies from the Blount County Sheriff's Department, Mark Proctor and Floyd F. Kimball, were on routine patrol in their cruiser on the Marshall Hill Road, a rural, gravel road in Blount County, Tennessee, when they came over a rise in the road and observed, approximately two hundred feet ahead of them, an automobile that was in the process of backing from the public road into a driveway that led into an open field, said vehicle stopping some fifteen to twenty feet off of the public road and up into the private drive. As the vehicle observed by them was so backing, they observed that its headlights were off, although its parking lights were on. The cruiser was brought to a stop in front of the driveway and the deputies got out. At about the same time, the occupant of the vehicle got out, walked the fifteen or twenty feet down to the edge of the public road and inquiry was made as to whether or not there was any trouble or if anything was wrong. The deputies observed that the person appeared to be nervous in that he was wringing his hands, lit a cigarette, took two or three puffs on it and stomped it out, and in general seemed to them to be trying to keep them away from his car. The deputies then walked the fifteen to twenty feet up to the petitioner's vehicle which

was then on private property off of the public road, shined their flashlights into it, and observed what appeared to them to be some antique rifles and Christmas packages on the back seat and back floorboard. Based on such observations by them, the petitioner was asked to have a seat in the cruiser while the deputies radioed for a superior officer, who shortly arrived at the scene, was briefed by the deputies on what had occurred, himself observed the property in the petitioner's vehicle, and almost immediately thereafter placed the petitioner under arrest for "investigation." At that time, there had been no report of the property found in petitioner's car as having been stolen in a burglary that had occurred earlier that day. Petitioner was then taken to the Blount County Jail where he was "booked on investigation" and held without bond or further charge for several days. Later that evening, a report was received regarding the property that had been taken in a burglary at the home of a Ken Cornett, and petitioner was eventually charged, indicted, tried and convicted of the offense of concealing stolen property, for which he received a sentence of not less than three years nor more than ten years in the state penitentiary.

VI

ARGUMENT AND CONTENTIONS IN SUPPORT FOR ALLOWANCE OF WRIT

The Court of Appeals of Tennessee has decided a Federal constitutional question of substance which has not been specifically heretofore determined by this Court, and in addition has decided said Federal question of substance in a way and manner which is not in accord with comparable applicable principles and decisions of this Court.

The petitioner, Earl Dean Effler, was indicted on December 14, 1972, by the Blount County Grand Jury for the crime of concealing stolen property, said indictment providing as follows:

> The Grand Jurors of the State of Tennessee, duly elected, impaneled, sworn, and charged to inquire in and for the body of the County of Blount in the State aforesaid, upon their oaths, present that Earl Dean Effler late of the said County, heretofore, to wit, on the 3rd day of December, 1972, with force and arms, in the County of Blount aforesaid, then and there, unlawfully feloniously and fraudulently did conceal and aid in concealing certain personal property, to-wit: shotgun, two rifles, one pearl necklace, one electric shaver, one sewing chest, all to the value of $1,000.00, the property of Ken Cornett, which said property had been feloniously taken and stolen from the said owner, the said Earl Dean Effler aforesaid knowing the same to have been so obtained, with the fraudulent intent to convert the same to his own use and to deprive the true owner thereof, against the peace and dignity of the State of Tennessee.

Thereafter, on January 2, 1973, a Motion to Suppress was filed on his behalf which is appended hereto in the Appendix (p. A. 1), and a hearing was held thereon on January 2, 1973, outside the presence of the jury, the testimony introduced having been heretofore referred to and copied verbatim in the Appendix hereto (pp. A. 4-A. 23). The trial court overruled the Motion to Suppress, said Order being likewise appended hereto in the Appendix (p. A. 24). Thereafter, the petitioner was convicted of the offense charged in the indictment, the punishment being fixed at a maximum period of ten years in the state penitentiary, a copy of said felony judgment entered by the trial court on January 3, 1973, being appended hereto in

the Appendix (p. A. 25). From that final judgment, a timely Motion for New Trial was filed and overruled, and an appeal granted to the petitioner to the Court of Criminal Appeals of Tennessee upon the posting by him of a $5,000.00 appearance bond. The Court of Criminal Appeals affirmed the conviction as shown in its Opinion and Judgment appended hereto in the Appendix (pp. A. 26-A. 31), and from that Judgment a Petition for Certiorari in the Tennessee Supreme Court was filed by the petitioner. The Supreme Court of Tennessee denied the petition on April 1, 1974, said Order being appended hereto in the Appendix (p. A. 31), which resulted in the judgment of the Court of Criminal Appeals of Tennessee becoming final in the State of Tennessee court system. On April 2, 1974, an Order staying execution of that judgment and allowing the petitioner ninety days within which to file a Petition for Writ of Certiorari in the United States Supreme Court was entered, said Order likewise being appended hereto in the Appendix (p. A. 32). The sole issue raised in this Petition concerns the legality of the search and seizure of the items of personal property taken from his automobile, and introduced into evidence over his objection at the trial, without which no conviction could have been obtained. No case exactly in point has been found and particularly none has been found where the automobile searched was off of the public highway, was not stopped by the searching officers, where no arrest for any traffic offense was made by the searching officers, and where the searching officers at the time of the search had no knowledge regarding the items which were seized as having been stolen and made the basis for a criminal prosecution as in the present case. In this case, if the evidence is finally determined to be constitutionally admissible, it must necessarily be upon the consideration of certain principles derived from a variety of cases dealing with automobile searches. It is

now settled that evidence obtained by search and seizure in violation of the Fourth Amendment to the United States Constitution is inadmissible in state court proceedings, *Mapp v. Ohio*, (1961) 367 U.S. 643, 6 L. Ed. 2d 1081, 81 S. Ct. 1684.

The Fourth Amendment to the United States Constitution requires that a warrant issue from a magistrate before a search and seizure may be conducted. To this rule there have been recognized certain exceptions not requiring a search warrant, and where the state relies upon one of the exceptions to the warrant requirement, the burden rests upon the state to demonstrate the availability of that exception in a particular case, see *United States v. Garay*, (1973) 477 F.2d 1306, and *Coolidge v. New Hampshire*, (1971) 403 U.S. 443, 29 L. Ed. 2d 564, 91 S. Ct. 2022. One of the exceptions to the warrant requirement is a search incident to a valid arrest, while another exception, more relevant to the present case, is a search without a warrant of moving objects such as motor vehicles.

> Searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.
>
> *Katz v. United States*, 389 U.S. 347, 357 (1967) (footnotes omitted). Fourth Amendment requirements are binding on the states. *Ker v. California*, 374 U.S. 23 (1963).

The exception regarding motor vehicles is justified on the grounds of necessity, that is, it is not practicable to secure a warrant under the circumstances because the vehicle can be quickly moved out of the locality or jurisdiction within which the warrant must be sought, this rule

having been first laid down in *Carroll v. United States*, (1925) 267 U.S. 132, 69 L. Ed. 2d 543, 43 S. Ct. 280.

The Court of Criminal Appeals of Tennessee has had recent occasion to cite with approval the *Carroll* decision, *supra*, in the case of *Vaughn v. State*, (1971) 477 S.W.2d 260, and at page 262 of said Opinion the following statement is made:

> "The pivotal question, as we view this record, is whether the search as conducted was legal. We are satisfied that the search of the trunk and the discovery of the fourteen cases of Robitussin was not connected in any manner with the offense which brought about the initial arrest. In fact, the only basis the officer had for making the search was his suspicion that was aroused by the mannerisms of Vaughn. This is not sufficient. In Carroll v. United States, 267 U.S. 132, 149, 45 S. Ct. 280, 283-284, 69 L. Ed. 543, the following may be found:
>
> "'On reason and authority the true rule is that if the search and seizure without a warrant are made upon probable cause, that is, upon a belief, reasonably arising out of circumstances known to the seizing officer, *that an automobile or other vehicle contains that which by law is subject to seizure and destruction, the search and seizure are valid*.' (Emphasis added.)
>
> "The trooper had no prior knowledge of any other offense having been committed by the defendants, because, as he related, he was looking for anything he could find. In short, he was conducting a condemned exploratory search."

Beginning with *Carroll v. United States, supra*, there have been a series of cases from the United States Supreme

Court dealing with motor vehicle searches, and a comprehensive and exhaustive analysis of these cases is contained in the *Coolidge* case, *supra*, which reviewed practically every case dealing with the subject, including *Preston v. United States*, (1964) 376 U.S. 364, 11 L. Ed. 2d 777, 84 S. Ct. 881, *Dyke v. Taylor Implement Mfg. Co., Inc.*, (1968) 391 U.S. 216, 20 L. Ed. 2d 538, 88 S. Ct. 1472, and *Chambers v. Maroney*, (1970) 399 U.S. 42, 26 L. Ed. 2d 419, 90 S. Ct. 1975.

Of the leading cases on the subject mentioned above, that of *Dyke v. Taylor Implement Mfg. Co., Inc.*, seems to be most similar to the present case, and coincidentally the *Dyke* case also arose in Tennessee with the Tennessee Supreme Court having affirmed the conviction from which certiorari was granted by the United States Supreme Court, and the conviction set aside on the grounds that the evidence was not obtained in compliance with the Fourth and Fourteenth Amendments.

An annotation in 10 A.L.R. 3d, page 314, entitled "Lawfulness of Search of Motor Vehicle Following Arrest for Traffic Violation," contains references to many lower court decisions dealing with the general subject of such searches. Although there was no testimony offered at the suppression hearing of any traffic violation committed by the petitioner, the Tennessee Court of Criminal Appeals' opinion mentions that the operation of the car on the highway at night without lights was in fact an offense committed in the officers' presence, and, therefore, the reason for petitioner making reference to this annotation. At pages 339 and 340 of that annotation in a discussion of *McCurdy v. State*, (1965) 42 Ala. App. 646, 176 So. 2d 53, the following pertinent statement is made:

> 'The court added that the search of the trunk of defendant's automobile could not be justified on the ground that the officer was looking for weapons of escape, and the search was quite obviously not for the purpose of disarming a prisoner or preventing an escape, but was for the purpose of a general exploration for whatever might turn up. It was further observed that it did not appear what crime defendant committed, and the court could not assume that he committed a crime of which there were fruits or implements subject to seizure, and that to justify a search and seizure as incidental to a lawful arrest, it must appear that the search and seizure had some reasonable relation to the offense for which the arrest was made."

The Court of Criminal Appeals of Tennessee in its relatively short Opinion, consisting of only three pages and citing only three cases in support of its Opinion affirming the conviction, seems to place particular emphasis on the fact that after the petitioner had alighted from his car and approached the officers' cruiser, that he was wringing his hands and nervously puffing on a cigarette. While the Tennessee appellate courts in its decision did not discuss the "furtive" movement or gesture theory as justifying the search, it perhaps would be relevant to a proper determination of its validity in this case. An annotation on that subject is contained in 45 A.L.R. 3d, Page 581, in which the principal case preceding the annotation is that of *People v. Superior Court of Yolo County*, (1970) 3 Cal. 3d 807, 91 Cal. Rptr. 729, 478 P.2d 449, and at page 580 in Vol. 45 of A.L.R. 3d, the following appropriate statement is made: "But a search 'prompted by a general curiosity to ascertain what, if anything, was within the defendant's vehicle' (*People v. Cruz*, (1968) *supra*, 264 Cal. App. 2d 437, 441) is manifestly exploratory in nature, and violates both the letter and the spirit of the Fourth Amendment."

From a review of the many cases on the subject of motor vehicle searches, it thus appears that at least two conditions must be present before the search of a motor vehicle may be legally justified without a warrant, the first of which is that of probable cause, which has been defined as knowledge of facts justifying a reasonably prudent person in believing that a crime has been or is being committed, and that evidence thereof is contained in the automobile in question, *People v. Erickson*, (1964) 31 Ill. 2d 320, 201 N.E.2d 422; and the second of which is that there must be exigent circumstances present which Webster defines as "requiring immediate aid of action." In that connection, let us examine the circumstances which initially confronted the searching officers in the present case:

On a Sunday night in December, 1972, in the nighttime, two deputies on routine patrol in a rural area observed a motor vehicle approximately two hundred feet to their front with only its parking lights on, backing into a private driveway. By the time they arrived to the location, the motor vehicle is stopped some fifteen to twenty feet off the public highway, and the occupant of that vehicle walks down to the stopped cruiser and inquires if anything is wrong. Neither of the deputies knows the person, no report has been received regarding the automobile being stolen, or of it containing contraband or stolen property, but based apparently only on the nervous mannerisms of the defendant, one of the deputies decides to take a further look into the automobile by walking the approximately twenty feet up the private driveway to it, and either by opening the door or shining his flashlight through the car window, he discovers what to him appears to be unusual items of personal property. The occupant is then detained by the two deputies until their superior arrives, and the superior upon observing the situation places the person under arrest for "in-

vestigation". Prior to the first deputy walking the distance from the public road to search the petitioner's vehicle, what reason or probable cause of any criminal activity did he have knowledge of at that time? Based solely on his feeling from the so-called nervous mannerisms of the petitioner, would he have been then able to obtain from a neutral magistrate a search warrant for that motor vehicle? Petitioner submits that the obvious answer to that question would be "no". All of the cases seem to agree that a general exploratory search is to be condemned, notwithstanding that it may satisfy the curiosity of the officer and even bear out his suspicions by being contraband or some other evidence of crime being discovered as a result of such curiosity. However, neither an arrest nor a search, otherwise unlawful, may be validated by what it produces, *Wong Sun v. United States*, (1963) 371 U.S. 471.

But probable cause should not be based on any sixth sense that some law enforcement officers might possess, nor upon mere suspicion of possible criminal activity. The *Carroll* opinion, *supra*, pointed out, as in all searches, there must be probable cause to believe "that the contents of the automobile offend against the law ..." 267 U.S. at page 156.

It is further submitted by the petitioner that the "plain view" doctrine, as recognized and discussed by this Court in some cases, is simply not applicable to the present case because the seized items were not in plain view, but were discovered by the searching officers taking affirmative steps in the nighttime, off of the public highway onto private property, and shining their flashlights into petitioner's vehicle, and thereafter seizing said items, all of such actions being inconsistent with the requirements necessary for the application of the "plain view" doctrine.

The only conclusion to be drawn from the actions of the officers from the time their attention was first drawn to the petitioner's motor vehicle until their discovery of the items in it which later turned out to be stolen is that they just felt like "something fishy was going on" and so they went fishing and discovered the evidence upon which this conviction was based. "Fishy" and suspicious circumstances standing alone should not be the foundation for a criminal prosecution such as this which has resulted in a penitentiary sentence of not less than three nor more than ten years for the petitioner. There is not present in this case either probable cause or exigent circumstances, both of which are required before a warrantless search of a motor vehicle may be validly conducted. Petitioner, therefore, contends that from a thorough examination of the circumstances surrounding the search of his motor vehicle, the only reasonable conclusion to be drawn is that the search and subsequent seizure of the evidence was unreasonable, and, therefore, clearly in violation of the Fourth Amendment as applied to the states through the Fourteenth Amendment to the United States Constitution.

VII

SUMMARY AND CONCLUSION

In summary, petitioner submits that only one logical conclusion can follow from an analysis of the circumstances under which the evidence was obtained that resulted in the petitioner's conviction, namely, that it clearly resulted from an unreasonable search in violation of the Fourth Amendment to the United States Constitution, and that, therefore, the trial court committed prejudicial and reversible error in overruling petitioner's motion to suppress such evidence. Consequently, petitioner submits that this Court should issue a writ of certiorari to the Tennessee Court of Criminal Appeals, and thereafter reverse the Opinion of that Court and set aside the conviction of the petitioner, or in the alternative award him a new trial.

Respectfully submitted,

HUGH F. LaRUE, III
Tenth Floor
Valley Fidelity Bank Building
Knoxville, Tennessee 37902
Telephone No. (615) 522-4191

Attorney for Petitioner